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SUPREME COURT, U.S.
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No. _____

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IN THE

Supreme Court of the United States

October Term, 1993

Frederick L. Jordan, Jr.,
Petitioner,

v.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 7, 1993

QUESTIONS PRESENTED FOR REVIEW

Petitioner seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit entered in the appeal of Frederick L. Jordan, Jr., Appellant, v. United States of America, Respondent, No. 92-35573. The issue before the Court of Appeals was the applicability of the intramilitary immunity doctrine of Feres v. United States, 340 U.S. 135 (1950), to deprive the Federal Courts of jurisdiction and thus bar a claim against the United States for medical negligence resulting in injury and permanent disability to Cpl. Frederick L. Jordan, Jr.

Questions presented to the Court of Appeals and presented here are:

1. Should Feres v. United States, 340 U.S. 135 (1950), be reversed in its entirety?
2. Should Feres v. United States, 340 U.S. 135 (1950), be modified to permit claims under the Federal Tort Claims Act for medical negligence in non-combat situations?

LIST OF PARTIES

The names of all parties in this case are contained in the caption of this Petition.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Frederick L. Jordan, Jr., Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Ninth Circuit entered in the above entitled case on July 23, 1993.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Ninth Circuit, delivered upon the rendering of its judgment in this case, is set forth in Appendix A to this Petition. The Order and Judgment of the U.S. District Court for the Western District of Washington, dated May 29, 1992, are set forth in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals of the Ninth Circuit was entered on July 23, 1993. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1254(1).

STATUTES INVOLVED

28 U.S.C. §1346(b) states in relevant part the following:

> Subject to the provisions of chapter 171 of this title (28 U.S.C., §2671 et seq.), the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss to property, or personal injury or death caused by negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, as a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

During February, 1987, Petitioner Frederick L. Jordan, Jr. enlisted in the U.S. Marine Corps. After basic training, Cpl. Jordan was assigned to the Marine

Corps Air Station in Tustin, California, where his duties were limited to repair and service of military aircraft. Cpl. Jordan's assignment to MCAS Tustin continued without interruption until his medical discharge in May, 1990.

On May 27, 1989, while stationed at MCAS Tustin, Cpl. Jordan experienced blackouts and other symptoms related to hypertension; this was the first incident in which those symptoms appeared. Cpl. Jordan immediately reported to the base infirmary. The infirmary then transferred Cpl. Jordan to the Long Beach Naval Hospital for examination and treatment. An appointment was scheduled for the afternoon of May 27, 1989. After consultation with a staff neurologist at the Long Beach Naval Hospital that

afternoon, Cpl. Jordan was admitted as an inpatient for a series of tests.

Cpl. Jordan remained at the Long Beach Naval Hospital for a period of four days, during which time he underwent a series of blood tests and other medical procedures. On the third day, before other test results were available, Cpl. Jordan underwent a spinal tap procedure upon the recommendation of the treating neurologist. All tests produced negative results (other than a finding of high cholesterol), and Cpl. Jordan was released to active duty on June 2, 1989.

Cpl. Jordan complained of an immediate onset of low back pain during the spinal tap procedure. He was advised by the treating neurologist, however, that the pain was the result of muscle spasms only.

The neurologist further advised Cpl. Jordan that: muscle spasms were a common side effect of any spinal tap procedure; that the pain should not create any concern; and that the pain would eventually subside.

Cpl. Jordan's back pain continued to increase after his return to active duty. On June 15, 1989, the pain increased to the point where Cpl. Jordan was immobilized. He was then transferred by ambulance from MCAS Tustin to the El Toro, California Naval Air Station. While at the El Toro facility, Cpl. Jordan underwent a series of x-rays and other tests; the tests produced negative results, and Cpl. Jordan was released the same afternoon.

Cpl. Jordan's condition worsened, with

continually increasing low back pain. On July 3, 1989, his condition worsened to the point where he became bedridden. Cpl. Jordan was then transferred by ambulance to the El Toro medical facility; after a brief examination, he was immediately transferred to the Long Beach Naval Hospital. While at the Long Beach Naval Hospital, Cpl. Jordan continued to complain of pain in the low back area; Cpl. Jordan also reminded medical personnel that he had undergone a prior spinal tap procedure at the hospital. Medical personnel insisted that the back pain was the result of muscle spasms, and unrelated to the spinal tap procedure. Cpl. Jordan was referred to physical therapy, but no further testing was performed.

Cpl. Jordan's condition deteriorated further while at the Long Beach Hospital. On July 25, 1989, Cpl. Jordan's treating neurologist said "I've never had anything like that happen before." The same physician then stated that "you probably have inflamed discs," and that "it [the pain] will go away."

The pain did not "go away," as suggested. In fact, Cpl. Jordan was transferred to the Spinal Clinic at the San Diego Naval Hospital later the same day, July 25, 1989. Upon admission, a series of blood tests were performed; those tests immediately determined that Cpl. Jordan was suffering from a severe infection arising from the prior spinal tap procedure. On July 26, 1989, Cpl. Jordan underwent an MRI scan. On July 27,

1989, Cpl. Jordan underwent surgery, resulting in an L2/L3 laminotomy and disc debridement.

While at the San Diego Naval Hospital, Cpl. Jordan was advised for the first time that his condition (and resulting surgery) was the result of negligent medical care provided by Long Beach Naval Hospital personnel. Specifically, Cpt. John Webster, the treating surgeon at the San Diego Naval Hospital, advised Cpl. Jordan that his condition resulted from improper administration of the spinal tap procedure, and improper or inadequate follow up care.

In fact, Cpt. Webster questioned whether a spinal tap was medically indicated at the time of administration. Cpt. Webster further stated that the

infection resulting in the surgery would have been eliminated if proper tests had been performed and antibiotics administered immediately after the first onset of low back pain. Cpt. Webster concluded by stating that infections of the type experienced by Cpl. Jordan are fairly common after administration of spinal tap procedures, and that accepted medical practice requires specific attention to extended complaints of low back pain.

Cpl. Jordan suffers from a 20% permanent partial disability as a result of the laminotomy. Furthermore, the Dept. of the Navy reported that "the injury/illness has been determined not to be combat related."

Cpl. Jordan received a medical

discharge from the U.S. Marine Corps on May 8, 1990. While Mr. Jordan has experienced a "gradual resolution of symptoms," he continues to experience severe and debilitating low back pain. Now, over three years after discharge, Mr. Jordan continues to suffer from pain and discomfort in the low back, with associated restriction of physical activity. There is no medical indication that Mr. Jordan's condition will ever improve past its present level.

Subsequent to discharge from the U.S. Marine Corps, Mr. Jordan applied for Veterans' disability benefits. Those benefits were denied, leaving Mr. Jordan with no option other than proceeding with a claim against the Government. Mr. Jordan retained counsel on July 10, 1991,

and proceeded with the present action.

By letter dated July 10, 1991, notice of Mr. Jordan's claim was submitted to the commanding officer at the Long Beach Naval Hospital. That letter included a Claim for Damage, Injury, or Death (Standard Form 95), setting forth the basis of the claim. By letter dated August 14, 1991, the Department of the Navy rejected Mr. Jordan's claim stating, among other things, that the claim was precluded by active military status at the time of the injury. That letter also advised Mr. Jordan to file a claim under the Military Claims Act, 10 U.S.C. §2733.

Mr. Jordan responded with a letter dated September 15, 1991. That letter addressed the issues raised in the July 14, 1991 letter, and requested an

immediate response. By letter dated October 23, 1991, the Department of the Navy rejected Mr. Jordan's claim for damages under the Military Claims Act. This action followed, with an Amended Complaint being filed with the U.S. District Court for the Western District of Washington on January 17, 1992.

District Court Jurisdiction

Jurisdiction of the District Court was invoked in Frederick L. Jordan, Jr. v. United States of America, Cause No. C92-22D, pursuant to 28 U.S.C. §1346(b). The Complaint alleged, in part, that the direct and proximate cause of Mr. Jordan's injury and physical disability was the medical negligence of the Defendant, United States of America, and the Department of the Navy and its agents and

employees, in the following particulars: (a) administration of a spinal tap procedure was not medically indicated in the first instance; (b) failure to inform or warn Mr. Jordan of the dangers inherent in the spinal tap procedure; (c) failure to administer the spinal tap procedure in accordance with accepted medical standards of practice; (d) failure to administer medication prior to and/or subsequent to the spinal tap procedure in order to prevent infection; (e) failure to diagnose an infection subsequent to the procedure, despite repeated complaints of pain and discomfort; (f) failure to adequately familiarize and inform hospital personnel of the dangers of the spinal tap procedure, and institute proper procedures to overcome or lessen adverse reactions

thereto; and (g) continuing to advise the Petitioner that the pain and discomfort was normal and to be expected when, in fact, further diagnosis and treatment were medically indicated. It was further alleged that the exercise of proper medical care and attention did not require employees and agents of the United States of America to exercise complex, subtle, and professional judgment as to composition, training, equipping, and controlling of the military force.

The Rulings Below

Relying on the intramilitary immunity doctrine of Feres v. United States, 340 U.S. 135 (1950), the District Court granted a Motion to Dismiss filed by the Government. Mr. Jordan thereafter invoked the jurisdiction of the Court of Appeals

pursuant to 28 U.S.C. §1291. The Court of Appeals affirmed the Judgment of the District Court. Mr. Jordan now seeks review of the Judgment of the Court of Appeals.

The Facts Presented

In its opinion, the Court of Appeals summarized the facts surrounding the injuries and disability of Cpl. Jordan as follows:

> Cpl. Jordan enlisted in the United States Marine Corps in 1987. Following basic training, he was assigned to MCAS Tustin, where he served as a military aircraft mechanic. In May of 1989, Jordan experienced blackouts and other symptoms related to hypertension. He reported to the base infirmary and was transferred to Long Beach Naval Hospital for examination and treatment. Jordan remained at the Hospital for four days for medical testing. On the third day, he underwent a spinal tap upon the recommendation of the treating neurologist. All tests proved negative, and Jordan was released to active duty on June 2, 1989.

During the spinal tap procedure, Jordan complained of low back pain. He was assured that the pain was caused by muscle spasms, which were a common side effect of the procedure, and was told not to worry about the pain because it would eventually subside. However, the pain intensified after his release to active duty. On June 15, 1989, the pain necessitated Jordan's transfer by ambulance from MCAS Tustin to the El Toro Naval Air Station. At El Toro, Jordan underwent a series of x-rays and other tests, all of which proved negative, and he was released the same afternoon.

Despite the negative tests, Jordan's back pain increased. Within a few days, he was bedridden as a result of the pain. He was taken by ambulance to the El Toro medical facility and transferred immediately to the Long Beach Naval Hospital. Again, Jordan complained of low back pain, reminding medical personnel at the hospital that he had undergone a spinal tap a few weeks earlier. He was assured that the pain was the result of muscle spasms, and unrelated to the spinal tap procedure. He was referred to physical therapy, but no tests were performed.

Jordan's condition did not improve. On July 25, 1989, he was transferred to the Spinal Clinic at the San Diego Naval Hospital. Blood tests were

> performed and revealed that Jordan was suffering from a severe infection as a result of the spinal tap. Two days later, Jordan underwent surgery to remedy the condition.
>
> The treating physician at the San Diego Spinal Clinic informed Jordan that his condition and the surgery were the direct result of negligent medical care provided by the Long Beach Naval Hospital. Specifically, he was told that the spinal tap had been administered improperly and that the follow up care had been inadequate.
>
> Jordan sued to recover damages for his injuries. The district court dismissed the action, and Jordan appeals.

(App. 2-4).

The Findings of the Court of Appeals

In its opinion, the Court of Appeals ruled in part as follows:

> The law clearly precludes Cpl. Jordan's action against the government. See, Feres v. United States, 340 U.S. 135 (1950); Persons v. United States, 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988). In Feres, the Supreme Court held that the government is immune from suits "for

> injuries to service men where the injuries arise out of or are in the course of activity incident to service." Feres, 340 U.S. at 146. Under Feres and its progeny, the negligent treatment of military personnel by military doctors in a military facility has always been considered 'an activity incident to service.' Id. at 135-46; Atkinson, 825 F.2d at 202-05. While our sympathies lie with Cpl. Jordan, the law compels us to affirm the district court's dismissal of this action.

(App. 4-5; emphasis added). The District Court was equally sympathetic toward Mr. Jordan's claim, stating that "if the allegations against the doctors treating him were to prove true, the doctors were indeed negligent." (App. 6).

REASONS FOR GRANTING THE WRIT

The Federal Tort Claims Act, 28 U.S.C. §2674, states the following:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a

> private individual under the like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

The enactment of Federal Tort Claims Act in 1946 was a legislative acceptance by the United States of liability under circumstances imposing private liability; the statute, in and of itself, did not create new causes of action. United States v. Massachusetts Bonding and Insurance Co., 227 F.2d 385 (1st Cir. 1955), rev'd on other grounds, 352 U.S. 128 (1956).

The burden of proof in a Federal Tort Claims action is by a preponderance of the evidence. United States v. Artieri, 491 F.2d 440 (2nd Cir. 1974), cert. denied, 419 U.S. 878 (1974). The burden of proof in a medical negligence action brought under the Federal Tort Claims Act is satisfied under principles of state law: specifically, Mr. Jordan must demonstrate a deviation from an accepted standard of medical care in a particular geographic area, proximately resulting in damages. Weise v. United States, 424 F.2d 587 (7th Cir. 1984).

As stated by 28 U.S.C. §2675(a) "an action shall not be instituted upon a claim against the United States which has been presented to a Federal agency... unless such Federal agency has made final

disposition of the claim." The Federal Tort Claims Act provides an exclusive remedy for claims against the United States, as set forth in 28 U.S.C. §2679. Furthermore, as applies to this case, the Federal Tort Claims Act contains a specific exemption against "any claim arising out of the combatant activities of the military or naval forces...during time of war." 28 U.S.C. §2680(j).

Two significant post-war Supreme Court decisions determined the impact of military status on claims submitted under the Federal Tort Claims Act. In Brooks v. United States, 337 U.S. 49 (1949), the Court resolved the question of "whether members of the United States armed forces can recover under that act for injuries not incident to their service." Id., at

50. In Brooks, the claimants occupied a vehicle which was struck by a U.S. Army truck being driven by a civilian employee on a public highway. Id. The claimants were on active duty in the armed forces, although on furlough at the time of the accident. Id., at 50-51.

The Government moved to dismiss the claim in Brooks, arguing that the Federal Tort Claims Act did not apply to "servicemen." In reversing a dismissal, the Court in Brooks stated the following:

> The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that "any claim" means "any claim but that of servicemen." The statute does contain twelve exceptions. * * * One is for arising out of combatant activities of the military or navel forces..., during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to

> take away petitioner's judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what is was about when it used the term "any claim." It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

Id., at 51. (Emphasis added). Continuing, however, the Court in Brooks stated that "were the accident incident to the Brooks' service, a wholly different case would be presented." Id., at 52. In concluding, the Court in Brooks ruled that Veterans' disability benefits should be taken into account in any claim for damages. Id., at 53-54.

During the next term, the Supreme Court entered it decision in the celebrated case of Feres v. United States, 340 U.S. 135 (1950). In Feres, one of the Plaintiffs

submitted a claim under the Federal Tort Claims Act for medical negligence occurring while in the military service. Specifically,

> Plaintiff, while in the Army, was required to undergo an abdominal operation. About eight months later, in the course of another operation after plaintiff was discharged, a towel 30 inches long by 18 inches wide, marked "Medical Department U.S. Army," was discovered and removed from his stomach. The complaint alleged that it was negligently left there by the army surgeon.

Id., at 137. Each of the claimants in Feres was on active duty, and not on furlough, when their injuries were sustained. Id., at 138. The issue in Feres, then, was whether the Federal Tort Claims Act provided relief for injuries which were "incident to service;" as stated by the Court, "this is the 'wholly different case' reserved from our decision

in Brooks v. United States...." Id., at 138.

After a lengthy discussion, the Court in Feres concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. In arriving at that decision, however, the Court in Feres stated the following:

> A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage. And the few cases charging superior officers or the Government with the neglect or misconduct which have been brought, since the Tort Claims Act of which the present are typical, have either been suits by widows or surviving dependents, or have been brought after the individual was discharged. The compensation system, which normally requires no litigation, is not negligible or niggardly, as these cases

> demonstrate. The recoveries compare extremely favorably with those provided by most workmen's compensation statutes.

Id., at 45 (Fn. omitted; emphasis added). The clear focus in Feres, then, was Federal compensation and claim exclusion analogous to state worker's compensation systems.

The next forty years produced a significant amount of litigation under the Feres doctrine. Feres has been expanded, modified, and interpreted; however, its net impact of prohibiting tort claims for injuries incident to military service has remained essentially unchanged. The Feres doctrine was apparently expanded in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-672 (1977) to include the "government contractor"

defense. At one point, the exclusion was even referred to as the "'Feres/Stencel' doctrine." 1 Jayson, Federal Tort Claims (1989), §155.02, at 84.1, n.24.1. Ten years later, the "government contractor" defense was severely limited in Boyle v. United Technologies Corp., 487 U.S. 500 (1988). The present viability of that defense is now seriously questioned. Id., at 510. See also, Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741-752 (11th Cir. 1985).

In Shearer v. United States, 473 U.S. 52 (1985), the Court considered an estate claim of a serviceman who had been kidnapped and murdered by another serviceman while off duty and at an off-based location. In ruling against the appellant in Shearer, the Court seemed to

turn upon statutory considerations unrelated to Feres, i.e., the specific exclusion for "any claim arising out of assault or battery set forth in 28 U.S.C. §2680(h)." Id., at 57. However, the Court in Shearer provided insight into the meaning of the term "incident to service" in the following:

> Our holding in Feres v. United States..., was that a soldier may not recover under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." Although the Court in Feres based its decision on several grounds,
>
> > "[i]n the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.'" United States v. Muniz, 374 US 150...(1963)...

> The Feres doctrine cannot be reduced to a few bright-line rules, each case must be examined in light of the statute as it has been construed in Feres and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions,.... Aero Engineering Corp. v. United States, 431 US 666, 673, 52 L Ed 2d 665, 97 S Ct 2054 (1977), and whether the suit might impair essential military disciplines, see Chappell v. Wallace, 462 US 296, 300, 304, 76 L Ed 2d 586, 103 S Ct 2362 (1983).

Id. (Emphasis added). The focus in Shearer was arguably a restriction of the Stencel decision, supra.

The next decision construing the Feres doctrine was United States v. Johnson, 481 U.S. 681 (1987). That decision reversed Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983), in which the Court of Appeals ruled in favor of the claimant.

Johnson was a wrongful death claim, in which the decedent was a helicopter pilot for the U.S. Coast Guard stationed in Hawaii. Id., at 682-683. While responding to a distress call, the decedent requested radar assistance from the Federal Aviation Administration (FAA) due to weather conditions. Id. The FAA then assumed positive radar control over the helicopter; shortly thereafter, the helicopter crashed into the side of a mountain. Id.

In a 5-4 majority decision, the Court in Johnson overruled the Ninth Circuit Court of Appeals by stating in part as follows:

> Applying its new analysis to the facts of this case, the court found "absolutely no hint....that the conduct of any alleged tortfensor even remotely connected to the military will be

> scrutinized if this case proceeds to trial." 749 F.2d at 1539. Accordingly, it found that Feres did not bar respondent's suit.

Id., at 684-685. In reversing the appellate court decision, the Court in Johnson cited the rationale of Feres and related decisions. A significant consideration in Johnson was the availability of "generous statutory disability and death benefits...." Id., at 690-691.

The Johnson decision included a strong dissenting opinion by Justice Scalia on behalf of four members of the Court. Initially, the dissent said the following:

> The problem now, is then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it. We have not been asked by respondent here to overrule Feres; but I can perceive no reason to accept petitioner's invitation to extend it as the court does today.

The dissenting opinion then analyzed each of the various rationale for the Feres doctrine, as stated by Feres and subsequent decisions. Id., at 694-698.

The dissent in Johnson first rejected the "parallel private liability" argument as being textually unfounded. Id., at 694-695. The dissent in Johnson also noted, however, that the "parallel private liability" argument was "no longer controlling," pursuant to United States v. Shearer, supra. Id. See also, Shaw v. Grumman Aerospace Corp., supra.

The second rationale for the Feres doctrine, i.e., the need for preserving military discipline, was also severely criticized in the following:

> Feres itself was concerned primarily with the unfairness to the soldier of making his recovery turn upon where he

was injured, a matter outside of his control. Id., at 142-143, 95 L ed 152, 71 S Ct 153. Subsequent cases, however, have stressed the military's need for uniformity in its governing standards. See, e.g., Stencel Aero Engineering Corp. v. United States, 431 US 666, 672, 52 L Ed 2d 665, 97 S Ct 2054 (1977). Regardless of how it is understood, this second rationale is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA.

The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than (what Feres provides) uniform nonrecovery. See United States v. Muniz, 374 US 150, 162, 10 L Ed 2d abandoned this peculiar rule of solicitude in allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorized. See ibid. There seems to me nothing "unfair" about a rule which says that, just as a serviceman injured by a negligent civilian must resort to state tort law, so must a serviceman injured by a negligent Government employee.

To the extent that the rationale rests

> upon the military's need for uniformity, it is equally unpersuasive. To begin with, that supposition of congressional intent is positively contradicted by the text. Several of the FTCA's exemptions show that Congress considered the uniformity problem, see, e.g., 28 USC Sections 2680(b), 2680(i), 2680(k), yet it chose to retain sovereign immunity for only some claims affecting the military. §2680(j). Moreover, we have effectively disavowed this "uniformity" justification--and rendered its benefits to military planning illusory--by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting civilians to recover for injuries caused by military negligence.

Id., at 695-696. (Emphasis added). The dissent in Johnson further stated that "in sum, the second Feres rationale, regardless of how it is understood, is not a possible estimation of congressional intent, must less a justification for importing that estimation, unwritten, into the statute." Id., at 696-697.

According to the dissent in Johnson, the third rationale (availability of Government benefits) was unpersuasive and "no longer controlling" pursuant to United States v. Shearer, supra. The dissent in Johnson went on to say that:

> The foregoing three rationales--the only ones actually relied upon in Feres--are so frail that it is hardly surprising that we have repeatedly cited the labor-conceived-of "military discipline" rationale as the "best" explanation for that decision.
>
> * * * * *
>
> I cannot deny the possibility that some suits brought by servicemen will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us.

Id., at 698-699. The dissent in Johnson

concluded by stating that:

> The Feres Court claimed its decision was necessary to make "the entire statutory system of remedies against the Government...a workable, consistent and equitable whole." 340 US, at 139, 95 L Ed 152, 71 S Ct 153. I am unable to find such beauty in what we have wrought.
>
> * * * * *
>
> The point is not that all of these inconsistencies are attributable to Feres (though some of them assuredly are), but merely that bringing harmony to the law has hardly been the consequence of our ignoring what Congress wrote and imagining what it should have written. When confusion results from our applying the unambiguous text of a statute, it is at least a confusion validated by the free play of the democratic process, rather than what we have here: unauthorized rationalization gone wrong. We realized seven years too late that "[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." Rayonier, Inc. v. United States, 352 US, at 320, 1 L Ed 2d 354, 77 S Ct 374 (fn omitted).

Id., at 702. (Emphasis added).

As stated by the dissent in Johnson, Feres has been the object of "widespread [and] almost universal criticism." For instance, Feres was described as a "blunt instrument" in Bozeman v. United States, 780 F.2d 198, 200 (2d Cir. 1985). As stated by the Court in Jones v. United States, 655 F.Supp. 1032, 1036, (D.P.R. 1987), "we take small satisfaction, as did the Court in Bozeman, in noting that Plaintiff is currently receiving servicemen's survivors benefits from the Government. Although the 'alternative compensation' discussed in Feres is 'no longer controlling..., is makes the outcome of this case more palatable.'" See also, comment, "The Supreme Court--Leading Cases," 101 Harv.L.Rev. 119, 350-

356 (1987).

Feres was a bad decision based upon questionable premises. Subsequent decisions based upon Feres have produced an entire body of bad law. At the heart of the problem with Feres is the prohibition against "judicial legislation." As Justice Scalia stated in Johnson, the Supreme Court amended the Federal Tort Claims Act in a manner contrary to its clear wording and contrary to Congressional intent. The net effect of this violation of separation of powers is an arbitrary (and unreasonable) exclusion of remedies to a specified class of citizens.

The Feres decision was perhaps the result of post-war attitudes regarding military service, patriotic commitment,

and other intangible considerations. Even if such considerations existed at the time of Feres, there is no indication whatsoever that those considerations compel the continuance of the Feres doctrine. The Feres decision, and its impact, can only be categorized as unfair, unjust, and unequitable. There should be no distinction between different classes of citizens with regard to tort claims against the United States. The mere fact that a person is on active miliary duty at the time of an injury should not, per se, bar his or her right to recovery.

Feres should be overturned. Or, as suggested by Justice Scalia, Feres should be severely restricted to cases involving issues of military discipline or chain of command. Other causes of action, such as

medical negligence, should not fall within the purview of Feres.

In the present case, Mr. Jordan sustained serious injuries as a result of gross medical negligence. There is some question whether the medical procedure involved was even medically indicated. Even assuming that is it was, negligent diagnosis and follow-up care resulted in the aggravation of a condition resulting in a permanent disability. Proper medical attention would have corrected the problem without the results complained of in this case.

Medical decisions, regardless of the person by whom they are made, have absolutely nothing to do with military discipline or command structure. Those decisions are governed by entirely

different standards: i.e., the accepted standard of medical practice in a particular geographical area, based upon present health science principles. The problem here is compounded by the fact that many decisions in military hospitals are delegated to non-military personnel. It is an artificial distinction, at best, to exclude recovery for medical negligence simply because the plaintiff is on active military duty.

The appropriate standard of medical care applies to all health care providers, regardless of whether those health care providers pursue their professions in civilian or military practice. In essence, Feres sanctions a separate (and inferior) standard of medical practice in military hospitals. This result is hardly

in accordance with the purpose and intent of the Federal Tort Claims Act.

If Mr. Jordan were a private citizen, and received the same type of negligent care in a private medical facility, he would have every right to commence a legal action for medical negligence. The results should not be different simply because he was on active miliary duty at the time.

~~The~~ fact that medical negligence bears no resemblance to any of the considerations supporting the Feres doctrine must result in a conclusion that Mr. Jordan's claim constitutes an exception to the Feres doctrine. Thus, even if this Court is not in a position to overrule the Feres doctrine, it can certainly find an exception to the

service-related exclusion.

Another exception, although arguably "no longer controlling," is the fact that Mr. Jordan has been denied entitlement to Veterans' disability benefits. Moreover, he was denied any remedy under the Military claims Act. The net effect of a strict application of the Feres doctrine, together with the denial of benefits, is that a seriously injured military plaintiff has no legal remedies. This result is not "palatable" in any sense of the word. Jones v. United States, supra, 655 F.Supp. at 1036.

CONCLUSION

For the reasons stated herein, Petitioner Frederick L. Jordan, Jr. respectfully prays that a writ of certiorari be granted, thus permitting the

Court to resolve the continuing conflict over whether the Feres doctrine should be overturned or modified.

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October 7, 1993

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDERICK L. JORDAN, JR., a single person,	)	No. 92-35573
	)	D.C. No.
Plaintiff-Appellant,	)	CV-92-35573
	)	
vs.	)	**MEMORANDUM***
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States
District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge,
Presiding

Submitted July 12, 1993**
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

App. 2

Before: **CANBY, WIGGINS, T.G. NELSON,**
Circuit Judges

OVERVIEW

The district court dismissed Corporal Frederick L. Jordan, Jr.'s action, seeking recovery for negligent treatment at a miliary medical facility while on active duty, under the Feres doctrine. Jordan appeals, and we affirm.

FACTS

Cpl. Jordan enlisted in the United States Marine Corps in 1987. Following basic training, he was assigned to MCAS Tustin, where he served as a military aircraft mechanic. In May of 1989, Jordan experienced blackouts and other symptoms related to hypertension. He reported to the base infirmary and was transferred to Long Beach Naval Hospital for examination and treatment. Jordan remained at the Hospital for four days for medical testing. On the third day, he underwent a spinal tap upon the recommendation of the treating neurologist. All tests proved negative, and Jordan was released to active duty on June 2, 1989.

During the spinal tap procedure, Jordan complained of low back pain. He was assured that the pain was caused by muscle spasms, which were a common side effect of the procedure, and was told not to worry about the pain because it would eventually

subside. However, the pain intensified after his release to active duty. On June 15, 1989, the pain necessitated Jordan's transfer by ambulance from MCAS Tustin to the El Toro Naval Air Station. At El Toro, Jordan underwent a series of x-rays and other tests, all of which proved negative, and he was release the same afternoon.

Despite the negative tests, Jordan's back pain increased. Within a few days, he was bedridden as a result of the pain. He was taken by ambulance to the El Toro medical facility and transferred immediately too the Long Beach Naval Hospital. Again, Jordan complained of low back pain, reminding medical personnel at the hospital that he had undergone a spinal tap a few weeks earlier. He was assured that the pain was the result of muscle spasms, and unrelated to the spinal tap procedure. He was referred to physical therapy, but no tests were performed.

Jordan's condition did not improve. On July 25, 1989, he was transferred to the Spinal Clinic at the San Diego Naval Hospital. Blood tests were performed and revealed that Jordan was suffering from a severe infection as a result of the spinal tap. Two days later, Jordan underwent surgery to remedy the condition.

The treating physician at the San Diego Spinal Clinic informed Jordan that his

condition and the surgery were the direct result of negligent medical care provided by the Long Beach Naval Hospital. Specifically, he was told that the spinal tap had been administered improperly and that the follow up care had been inadequate.

Jordan sued to recover damages for his injuries. The district court dismissed the action, and Jordan appeals.

STANDARD OF REVIEW

The district court concluded that Cpl. Jordan's action was barred by the Feres doctrine. We reviewed de novo a district court's determination that it lacks subject matter jurisdiction under the Feres doctrine. Estate of McAllister v. United States, 942 F.2d 1473, 1475 (9th Cir. 1991), cert. denied, 112 S. Ct. 1164 (1992); Persons v. United States, 925 F.2d 292, 294 (9th Cir. 1991). We must determine independently whether the Feres doctrine applies to the facts in the record. McAllister, 942 F.2d at 1475; Persons, 925 F.2d at 294; McGowan v. Scoggins, 890 F.2d 128, 129 (9th Cir. 1989). In our review of the order dismissing the action, we must assume that all of Cpl. Jordan's allegations are true. McGowan, 890 F.2d at 136.

DISCUSSION

The law clearly precludes Cpl. Jordan's

action against the government. See, Feres v. United States, 340 U.S. 135 (1950); Persons v. United States, 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988). In Feres, the Supreme Court held that the government is immune from suits "for injuries to service men where the injuries arise out of or are in the course of activity incident to service." Feres, 340 U.S. at 146. Under Feres and its progeny, the negligent treatment of military personnel by military doctors in a military facility has always been considered 'an activity incident to service.' Id. at 135-46; Atkinson, 825 F.2d at 202-05. While our sympathies lie with Cpl. Jordan, the law compels us to affirm the district court's dismissal of this action.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FREDERICK L. JORDAN, JR., a single person, Plaintiff, vs. **UNITED STATES OF AMERICA,** Defendant.	No. C92-22D **ORDER**

THIS MATTER is before the Court on motion of defendant United States to dismiss. After full consideration of the briefs filed by counsel, this Court concludes that dismissal is required under existing law.[1]

Plaintiff brought this cause of action under the Federal Tort Claims Act for alleged medical malpractice. If the allegations against the doctors treating him were to prove true, the doctors were indeed negligent. However, application of

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[1] Although plaintiff has requested oral argument, the law is so well settled as to the issue here that the Court concludes that oral argument would add nothing.

the Feres doctrine precludes suit.

As an initial matter, Jordan argues that the government's motion is more properly designated a motion for summary judgment, rather than a motion to dismiss for lack of jurisdiction. The distinction between Rule 12(b) and Rule 56 in this instance is not significant since under either rule, dismissal would follow. Plaintiff admits the relevant facts: at the time of his injury he was a member of the Armed Forces and was treated by military doctors. As a matter of law his claim is precluded by the Feres doctrine in its many manifestations.

Even assuming all of plaintiff's allegations to be true, he does not state a cause of action which would confer jurisdiction of this Court. Plaintiff Frederick L. Jordan, Jr. enlisted in the United States Marine Corps in 1987. While stationed at MCAS Tustin, California in 1989, he experienced blackouts and sought medical aid at the base infirmary. He was accepted as a patient at the Long Beach Naval Hospital and underwent a series of tests there. One of the tests was a spinal tap. Jordan began experiencing pain thereafter, which finally incapacitated him. He was again hospitalized, but not properly diagnosed as having a severe infection in his spine until nearly two months after the original spinal tap. He then underwent surgery to have a laminotomy and disc debridement and

received extended intravenous treatment with antibiotics. He continued to suffer pain after release from the hospital and was discharged from the Marine Corp May 8, 1990.

Jordan contends that the decision to administer a spinal tap was negligent; the actual test was negligently administered; and the failure to diagnose the resultant infection was negligent. He asserts a 20 percent partial disability now. He also asserts having made a claim under the Military Claims Act which was rejected by the Navy.[2]

With passage of the Federal Tort Claims Act, 28 U.S.C. §1346, et seq., Congress waived its sovereign immunity to the extent of permitting suits against it for the tortious conduct of its employees. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court established a doctrine excluding suits brought by members of the armed services against the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. Thus in a 1989 case, the Supreme Court held that there was no cause of action for the death of a Coast Guardsman who was on a rescue

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[2] Jordan has not fleshed out an argument that lack of compensation should prevent application of the Feres doctrine. The lack of compensation, however, is irrelevant to application of the Feres doctrine. Sidley v. United States Dept. of Navy, 861 F.2d 988, 990-91 (6th Cir. 1988).

mission incident to service, where his surviving spouse attempted to sue a flight controller (a civilian employee of the federal government). United States v. Johnson, 481 U.S. 681 (1989). The Court also explained the military connection: "Where a service member is injured incident to service -- that is, because of his military relationship with the government...." Johnson, at 689.

The Ninth Circuit has observed that the Feres doctrine is particularly applicable "in cases alleging medical malpractice in a military facility." Persons v. United States, 925 F.2d 292, 296 (9th Cir. 1991). The Persons Court held that there was no cause of action for medical malpractice in failure to diagnose and treat a naval officer who committed suicide. In Persons, the Ninth Circuit also cited to Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988), and Veillette v. United States, 615 F.2d 505 (9th Cir. 1980). In Atkinson, a servicewoman alleged that negligent medical treatment at a military hospital caused her child to be stillborn; and in Veillette a serviceman injured off-duty alleged negligence by personnel treating him at a naval hospital. The Persons court cited these cases as controlling in precluding suits against the government.

In the present circumstances, the doctrine bars suit. Plaintiff was on

active service. His access to a military hospital was therefore incident to this service.

Plaintiff argues that application of the Feres doctrine would be unfair, and cites the dissent in Johnson at 692 (Scalia, J. joined by Brannan, Marshall and Stevens, JJ. arguing that the Feres doctrine was wrong ab initio). The Ninth Circuit has also expressed considerable frustration with the Feres doctrine. See, e.g., Estate of McAllister v. United States, 942 F.2d 1473 (9th Cir. 1991), cert. denied, 112 S.Ct. 1164 (1992). As the Ninth Circuit noted, the Feres doctrine "is highly controversial," "has been criticized," and "the results have not flowed easily from the doctrine's purported rationales." McAllister, at 1475-76. But as the Ninth Circuit concluded, "the Feres doctrine remains the law of the land, and we must undertake to apply it." Id. at 1476.

THEREFORE, the motion of the United States is **GRANTED**, and plaintiff's cause of action is **DISMISSED**.

The Clerk of Court is directed to send copies of this Order to all counsel of record.

DATED this 29th day of May, 1992.

CAROLYN R. DIMMICK
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FREDERICK L. JORDAN, JR.,	
Plaintiff,	**JUDGMENT IN A CIVIL CASE**
vs.	
UNITED STATES OF AMERICA,	No. C92-22D
Defendant.	

IT IS SO ORDERED AND ADJUDGED that defendant United States of America's motion for summary judgment is **GRANTED** and this action is **DISMISSED.**

DATED May 29, 1992 **BRUCE RIFKIN**